Supreme Court, U.S.
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No. 99-1259

In the Supreme Court of the United States

ARTURO ARIZAGA RAMOS, PETITIONER

v.

DISTRICT DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF IMMIGRATION JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction under 28 U.S.C. 2241 to review petitioner's contention that the Constitution does not permit Congress to make an alien convicted of an aggravated felony subject to removal from the United States without the opportunity for discretionary relief from removal.

2. Whether the Constitution permits Congress to provide that an alien convicted of an aggravated felony is subject to removal without the opportunity for discretionary relief.

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In the Supreme Court of the United States

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v.

DISTRICT DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF IMMIGRATION JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A3) is unpublished, but the decision is noted at 202 F.3d 279 (Table). The order of the district court (App., *infra*, 1a-19a) is unreported. The orders of the Board of Immigration Appeals (App., *infra*, 20a-21a) and the immigration judge (Pet. App. A11) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1999. A petition for rehearing was denied on January 12, 2000. Pet. App. A4. The petition

for a writ of certiorari was filed on February 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge to the application and constitutionality of new provisions of the immigration laws concerning the treatment given to lawful permanent resident aliens who are found to be removable from the United States, and who are ineligible for discretionary relief from removal because of their convictions for certain serious crimes.

In 1996, the Immigration and Nationality Act (INA) was comprehensively revised by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. I, 110 Stat. 3009-546 *et seq.* IIRIRA eliminated the provisions under prior law for "deportation" and "exclusion" proceedings and instead created one new form of proceeding, known as "removal." See 8 U.S.C. 1229a (Supp. IV 1998).[1] Some aliens who are found to be removable may apply to the Attorney General for discretionary relief from removal (known as "cancellation of removal" under the new terminology of IIRIRA). See 8 U.S.C. 1229b(a) (Supp. IV 1998). An

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[1] IIRIRA did retain some distinctions in removal proceedings, based on whether the alien had been lawfully admitted into the United States. Aliens who have already been lawfully admitted into the United States may be removed from the United States if they are found to be "deportable" on one or more grounds. See 8 U.S.C. 1227(a) and 1229a(a)(1) (1994 & Supp. IV 1998). Aliens seeking admission into the United States may be denied admission and removed if they are found to be "inadmissible" on one or more grounds. See 8 U.S.C. 1182(a) and 1229a(a)(1) (1994 & Supp. IV 1998).

alien who is removable based on a conviction for an "aggravated felony," however, is ineligible for cancellation of removal. 8 U.S.C. 1229b(a)(3) (Supp. IV 1998). The INA defines "aggravated felony" to include illicit trafficking in a controlled substance, a crime for which petitioner was convicted. 8 U.S.C. 1101(a)(43)(B).[2]

IIRIRA also established significant changes to the provisions governing judicial review of final orders of removal. Section 306(b) of IIRIRA repealed former 8 U.S.C. 1105a (1994), which had governed judicial review of final orders of deportation. See 110 Stat. 3009-612. In its stead, Congress enacted a new 8 U.S.C. 1252 (Supp. IV 1998). See IIRIRA § 306(a)(2), 110 Stat. 3009-607. Section 1252(a)(1), as added by IIRIRA, provides that "[j]udicial review of a final order of removal (other than an order of removal without a hearing pursuant to [8 U.S.C. 1225(b)(1)]) * * * is governed only by" the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998), which requires that a petition for review be filed in the

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[2] Before the immigration laws were comprehensively revised in 1996, some aliens who were convicted of aggravated felonies and were deportable on that basis were nonetheless eligible to receive discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). Only aliens who had been convicted of an aggravated felony and had served a term of imprisonment of at least five years for that offense were categorically ineligible for relief. *Ibid.* In 1996, however, Congress twice made all aliens convicted of aggravated felony offenses ineligible for discretionary relief from deportation, without regard to the sentence imposed or served—first, in Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which amended 8 U.S.C. 1182(c), and then again in 8 U.S.C. 1229b (Supp. IV 1998), added to the INA by Section 304(a)(3) of IIRIRA, 110 Stat. 3009-594.

appropriate regional court of appeals, rather than the district court.[3] In addition, Section 1252(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(b)(9) (Supp. IV 1998).

2. Petitioner is a native and citizen of Mexico who entered the United States in 1977. In 1993, petitioner was convicted of receiving stolen goods, for which he was sentenced to probation. In 1995, he was convicted in state court of possession of a controlled substance (methamphetamine) for sale, for which he was sentenced to serve two years in prison. Pet. 4; App, *infra*, 2a.

In 1997, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner, charging him with being removable based on his conviction for possession of methamphetamine for sale, which is an aggravated felony under the INA. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). On November 18, 1998, an immigration judge (IJ) found petitioner

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[3] Section 1225(b) provides a procedure for inspection and removal of aliens seeking admission into the United States. In that situation, if the immigration officer determines that the alien is inadmissible, the officer shall order the alien removed without further hearing, unless the alien indicates an intention to apply for asylum or a fear of persecution. 8 U.S.C. 1225(b)(1)(A)(i) (1994 & Supp. IV 1998). Congress has expressly provided, in 8 U.S.C. 1252(e)(2) (Supp. IV 1998), for limited review of such orders by habeas corpus.

removable as charged. Pet. App. A11. On December 14, 1998, petitioner's counsel mailed a notice of appeal to the Board of Immigration Appeals (BIA). That notice, however, was not received by the BIA until December 21, 1998, and was therefore out of time. App., *infra*, 20a; 8 C.F.R. 240.15 (requiring filing of any appeal to the BIA within 30 calendar days of mailing of written decision by IJ, and defining filing date as receipt of notice of appeal by BIA). On March 12, 1999, the BIA dismissed the appeal as untimely. App., *infra*, 20a-21a.

3. On April 16, 1999, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. Petitioner contended, among other things, that he was denied effective assistance of counsel in his immigration proceedings because his counsel failed to file a timely appeal to the BIA, and that principles of due process and equal protection prohibit Congress from rendering a lawful permanent alien removable based on a criminal offense without regard to the alien's individual circumstances.

4. The district court denied petitioner's request for a preliminary injunction and dismissed the habeas corpus petition. App., *infra*, 1a-19a. The district court concluded that it was without jurisdiction to entertain the habeas corpus petition. In particular, the court determined that judicial review of petitioner's final order of removal was governed by Section 1252, including Section 1252(b)(9), which dictates that "the only avenue of judicial review * * * that might pertain to [petitioner's] case is a petition to the Court of Appeals for direct review of the removal order issued against him." *Id.* at 8a. The district court also relied (*ibid.*) on this Court's decision in *Reno* v. *American-Arab Anti-*

Discrimination Committee, 525 U.S. 471, 483 (1999) (*AADC*), where the Court referred to Section 1252(b) (9) as an "unmistakable 'zipper' clause" channeling cases into the courts of appeals rather than the district courts.

The district court also concluded that petitioner's claims were without merit. App., *infra*, 10a-19a. First, noting that petitioner "appears to be complaining about Congress's decision that a single aggravated felony is sufficient to require the removal of an alien who is otherwise lawfully present in the United States," the court concluded that Congress's "plenary authority over immigration matters" is sufficient to overcome any constitutional objections to that decision. *Id.* at 12a. The court also rejected petitioner's argument that the removal of an alien based on an aggravated felony conviction, without the opportunity for discretionary relief, violates equal protection because a United States citizen convicted of the same crime would face no such result. The court emphasized that removal "is not a remedy available against citizens but rather is an implementation of Congress' power to exclude" aliens from the United States. *Ibid.*

The court further ruled that petitioner had not been deprived of an opportunity to present his arguments during his immigration proceedings, since he appeared before an IJ and had the opportunity to appeal to the BIA, although he failed to do so in a timely manner. App., *infra*, 13a-14a. And it held that, insofar as IIRIRA made petitioner categorically ineligible for discretionary cancellation of removal based on his aggravated felony offense, that change in the law did not

contravene the presumption against retroactive application of federal civil statutes. *Id.* at 14a-16a.[4]

5. After granting a stay of deportation pending its decision in the case, Pet. App. A7, the court of appeals affirmed, *id.* at A1-A3.[5] Without definitively resolving the issue whether the district court would have had jurisdiction under 28 U.S.C. 2241 over a colorable constitutional challenge to petitioner's final order of removal, the court of appeals concluded that no such colorable constitutional challenge was presented in this case. *Id.* at A2. It rejected petitioner's contention that the Constitution prevented his removal "without having had an opportunity to present mitigating evidence," since "Congress has plenary power over immigration; that power encompasses the power to enact a statute

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[4] The district court stated that petitioner "does not show when Congress made his prior conviction an 'aggravated felony' for purposes of the immigration laws." App., *infra*, 15a n.11. In fact, petitioner's drug trafficking offense was classified as an "aggravated felony" even in 1995, when petitioner committed the offense and before IIRIRA was enacted. See 8 U.S.C. 1101(a)(43)(B) (1994). The change in the law introduced in 1996, by AEDPA and IIRIRA, was that all aliens convicted of aggravated felonies are ineligible for discretionary relief from deportation, without regard to the length of the sentence imposed or served. See p. 3 n.2, *supra*.

[5] On June 20, 1997, while petitioner's administrative removal proceedings were in progress, Larry Shanahan posted bond on behalf of petitioner. App., *infra*, 25a. On May 6, 1999, the INS sent Shanahan a Notice to Deliver, directing him to present petitioner to the INS office on June 1, 1999, in San Francisco. *Ibid.* Shanahan did not present petitioner to the INS on that date. On June 16, 1999, the INS District Director found that the delivery bond had been breached. *Ibid.* Shanahan appealed that decision to the INS Administrative Appeals Office, which affirmed the District Director's finding of a breach of bond. *Id.* at 25a-28a.

declaring removable any alien who has committed certain crimes." *Id.* at A3. The court also found no colorable issue presented under either the Ex Post Facto or Double Jeopardy Clause by the application to petitioner of IIRIRA's categorical exclusion of aliens convicted of aggravated felonies from discretionary cancellation of removal, noting that "[w]hile the consequences of deportation may assuredly be grave, they are not imposed as [a] punishment." *Ibid.* (quoting *AADC*, 525 U.S. at 491).

ARGUMENT

The court of appeals correctly held that petitioner's challenges to his removal order are without substance. The court of appeals' unpublished decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.[6]

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[6] There is a threshold issue whether the court of appeals erred in concluding that petitioner had not presented colorable claims on the merits, without first deciding whether federal courts actually had jurisdiction to decide those claims. This Court has disapproved the practice of "hypothetical jurisdiction" under which a federal court assumes, without deciding, that it has subject matter jurisdiction over the case but then rules on the merits against the plaintiff or complainant that invokes federal jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998). It does not appear, however, that the court of appeals contravened the *Steel Co.* rule against hypothetical jurisdiction in this case. The court of appeals concluded in this case that petitioner had not even presented a *colorable* challenge based in federal law to his removal order. It therefore did not reach the question whether the district court would have had habeas corpus jurisdiction if petitioner had presented a colorable constitutional claim. See Pet. App. A3 (citing *Webster* v. *Doe*, 486 U.S. 592, 603 (1988), in which the Court declined to read a statutory preclusion of judicial review to bar review of colorable constitutional claims). The court of

1. Petitioner appears to raise two constitutional challenges to his removal order. First, he contends (Pet. 12) that, because Congress has provided that only aliens, and not citizens, are to be removed from the United States based on the commission of an aggravated felony without the opportunity to present mitigating evidence, Congress has denied aliens equal protection. Second, he argues (Pet. 15-16) that principles of due process require that aliens be permitted an opportunity to show why, as a matter of discretion, they should not be removed. Both arguments are wholly without substance.

a. There is plainly no basis for petitioner's argument that Congress may not treat aliens and citizens differently merely because of the accident of the location of their birth (see Pet. 12). Citizens of the United States have a right inherent in the Constitution to reside in this country. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 694-704 (1898). Congress's power to exclude and expel aliens, by contrast, is a power inherent in the Nation's sovereignty. See *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893); see also *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993); *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982); *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924). The Court has consistently emphasized the breadth of the congressional prerogative to admit, exclude, or expel aliens:

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appeals' conclusion amounts, in effect, to a determination that the federal courts do not have jurisdiction over petitioner's claims. We do not read the *Steel Co.* decision as precluding federal courts from determining that the alleged federal claims before them are not even colorable and dismissing the claims on that basis, without first examining whether there would be a statutory basis for entertaining the claims if they were colorable.

> The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.

Fiallo v. *Bell*, 430 U.S. 787, 796 (1977).

Petitioner therefore errs in arguing (Pet. 11) that, in exercising its plenary authority over immigration, Congress is subject to a "proportionality" test similar to that governing Congress's power under Section 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. Generally, Congress's decision that certain classes of aliens should be excluded or expelled from the country need be justified only by "a facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794; see *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-770 (1972). And Congress may plainly order the removal of aliens who are a threat to the safety and security of the country, including criminal aliens. See *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957); *Lehmann* v. *United States ex rel. Carson*, 353 U.S. 685 (1957).

b. There is also no basis for petitioner's contention that, as a matter of constitutional principles of due process, he is entitled to an individualized consideration of whether the particular crime of which he was convicted is insufficiently serious to warrant his removal, or whether the particular facts and circumstances of his case warrant mitigation. As this Court has observed, the Attorney General's grant of discretionary relief from deportation is "an act of grace," akin to "a judge's

power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996). While petitioner does have a liberty interest in avoiding removal from the United States, that liberty interest is accorded constitutionally adequate due process by affording petitioner notice and an opportunity to contest the INS's charge of removability based on his criminal conviction, which was done in this case. The Constitution itself does not provide petitioner with any additional liberty interest or substantive right to contend that, even if he is removable based on his criminal conviction, he nonetheless should not be removed as a matter of discretion. Cf. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981).[7]

2. We also observe that the district court correctly concluded that it lacked subject matter jurisdiction over this case in light of 8 U.S.C. 1252(b)(9) (Supp, IV 1998). As the district court held (App., *infra*, 7a-9a), Section 1252(b)(9) requires that judicial review of all factual and legal issues arising out of a removal proceeding brought against an alien (to the extent that such judicial review is available) be had only by petition for review in the court of appeals. Accordingly, the district court did not have original jurisdiction, under

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[7] Petitioner briefly argues (Pet. 13-14) that the INS violated the court of appeals' order staying his removal by declaring him to be in breach of bond based on his failure to report to an INS officer under the terms of his bond agreement. The court of appeals' stay order, however, only prevented the INS from actually removing petitioner from the United States; it did not free petitioner from the conditions of his bond. It appears that the court of appeals reached a similar conclusion, as it denied petitioner's motion for sanctions. Pet. App. A8. That conclusion is correct and entirely factbound and therefore does not warrant further review.

28 U.S.C. 2241 or otherwise, to review petitioner's challenges to his removal order in this case.

There is presently a disagreement among the courts of appeals as to whether Section 1252(b)(9) divests the district courts of jurisdiction under Section 2241 to review challenges to removal orders brought by criminal aliens. Compare *Liang* v. *Reno*, Nos. 99-5053 et al., 2000 WL 264216, at *8-*13 (3d Cir. Mar. 9, 2000) (district courts do have jurisdiction) with *Max-George* v. *Reno*, No. 98-21090, 2000 WL 220502, at *8 (5th Cir. Feb. 24, 2000)(district courts do not have jurisdiction); see also *Richardson* v. *Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) (stating, in a case not involving a challenge to a final order of removal, that Section 1252(b)(9) divests the district courts of authority under 28 U.S.C. 2241 to review removal orders), cert. denied, No. 99-887 (Mar. 27, 2000). This case, however, does not present an appropriate vehicle for resolution of that issue, because the court of appeals' decision, which is unpublished, did not resolve that question. While the question whether the district courts have authority under 28 U.S.C. 2241 to review final orders of removal may eventually warrant this Court's resolution, that issue should be decided in a case in which it was resolved by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2000

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 99-1906 SBA

ARTURO ARIZAGA RAMOS, JR., PLAINTIFF

v.

DISTRICT DIRECTOR, DEFENDANT

[Filed: May 25, 1999]

ORDER DENYING PRELIMINARY INJUNCTION

On April 16, 1999, plaintiff Arturo Arizaga Ramos, Jr. ("Arizaga Ramos") filed this action, styled as a "complaint for habeas corpus relief," challenging an order of removal issued against him by the Immigration and Naturalization Service. Accompanying the complaint was an application for a temporary restraining order ("TRO"). After the government agreed to withhold execution of the removal order until June 2, 1999, the Court set a briefing schedule, with a hearing to follow. On further review, the Court finds this case suitable for decision without oral argument. *See* N.D. Cal. Civ. L.R. 7-1(b). Regarding the merits, the Court finds that plaintiff has neither raised serious questions nor shown a likelihood of success on the merits. Accordingly,

treating plaintiff's papers as a motion for preliminary injunction, the motion is DENIED.[8]

I. BACKGROUND

In June 1997, Arizaga Ramos received a Notice to Appear for "removal proceedings under section 240 of the Immigration and Naturalization Act ['INA']." (Admin. Rec. at 34.[9]) According to the notice, Arizaga Ramos is a citizen of Mexico who had been admitted to the United States, but who was subject to removal under section 237(a)(2)(A)(iii) of the INA because he had since been convicted of an "aggravated felony." (Admin. Rec. at 34.) Specifically, the notice charged that in May 1995 Arizaga Ramos had been convicted of possession of methamphetamine for sale, in violation of Cal. Health & Safety Code § 11378. (Admin. Rec. at 34.) Shortly after he received the Notice to Appear, Arizaga Ramos was released on $20,000 bail. (*See id.* at 32.)

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[8] Although plaintiff has moved only for a temporary restraining order, the present matter is appropriately treated as a motion for a preliminary injunction. Defendant has received notice and the Court has considered memoranda submitted by both sides. *See Viacom Int'l. Inc. v. FCC*, 828 F. Supp. 741, 743 & n.2 (N.D. Cal. 1993) (applying preliminary injunction standard to decide TRO application presented in same manner). Furthermore, it is clear from the papers that interlocutory injunctive relief is not appropriate in this case. *Cf. Religious Technology Center v. Scott*, 869 F.2d 1306, 1309 n.6 (9th Cir. 1989) (treating denial of TRO as a denial of preliminary injunction essentially because "the circumstances ma[d]e it unmistakably clear that the denial [was] tantamount to the denial of a preliminary injunction") (internal quotation omitted); *see also id.* at 1308-09.

[9] The Administrative Record is attached as an exhibit to the government's opposition papers filed May 11, 1999.

After a continuance of several months (*see* Admin. Rec. at 21, 22), the removal hearing was held on November 18, 1998 (*see id.* at 11, 21). At the hearing, it appears the government offered evidence of the drug conviction with which Arizaga Ramos was charged in the Notice to Appear. (*See id.* at 15 (abstract of judgment).) This evidence also showed that Arizaga Ramos had been convicted of receiving stolen property. (*See id.*; *see also id.* at 13-20 (other evidence related to plaintiff's two convictions).) The decision of the immigration judge ("IJ") following the hearing shows only that (1) Arizaga Ramos was ordered removed from the United States to Mexico; (2) his "application for cancellation of removal under section 240A(a) was . . . pretermitted,"[10] (3) a request for a further continuance was denied; and (4) any appeal was due by December 18, 1998. (*See id.* at 11.)

It appears that the immigration attorney for Arizaga Ramos mailed a notice of appeal to the Board of Immigration Appeals ("BIA") on December 14, 1998. (*See id.* at 6; *see also* Complaint ¶ 4.14.) However, the notice was not received by the BIA until December 21, 1998. Because the notice was untimely, the BIA eventually dismissed the appeal. (*See* Admin. Rec. at 2.) There is no indication that Arizaga Ramos petitioned for review before the United States Court of Appeals. However, he apparently has pending a motion to reopen before the BIA. (*See* Traverse at 2.)

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[10] At some point during the immigration proceedings, plaintiff apparently made an application for cancellation of removal, as provided for in section 240A of the INA, codified at 8 U.S.C. § 1229b. (*See* Complainit ¶ 4.12.) The contents of this application do not appear in the record.

Plaintiff filed this action on April 16, 1999. Accompanying the complaint was an application for a TRO. After the government agreed to withhold execution of the removal order until June 2, 1999, the Court set a briefing schedule. Pursuant to that schedule, the government filed its opposition to plaintiff's complaint on May 11, 1999, and plaintiff filed a traverse on May 18, 1999.

II. STANDARD OF REVIEW

The Court may grant a preliminary injunction where the movant demonstrates: "Either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in [the plaintiff's] favor." *American Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1411 (9th Cir. 1995) (citation omitted); *see also Viacom Int'l. Inc. v. FCC*, 828 F. Supp. 741, 743 & n.2 (N.D. Cal. 1993) (applying same two-prong test to TRO where defendants received notice of application and court considered briefs submitted by both sides). Under either prong of this test, the movant must "demonstrate a significant threat of irreparable injury, irrespective of the magnitude of the injury." *Big Country Foods, Inc. v. Board of Educ.*, 868 F.2d 1085, 1088 (9th Cir. 1989). Plaintiff must also demonstrate that there is no adequate remedy at law. *See Stanley v. University of So. Calif.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

III. DISCUSSION

In his complaint, plaintiff contends he was denied effective assistance of counsel during the immigration proceedings. Specifically, he contends that immigration counsel failed to challenge on various constitutional

grounds the "automatic deportation" of aliens with green cards "without an evidentiary hearing based on conviction of an aggravated felony." *See* Complaint ¶ 5.2(a). Plaintiff also contends he was denied effective assistance of counsel when his attorney failed to file a timely notice of appeal to the BIA. *See id.* ¶ 5.2(b). An appeal was necessary, Arizaga Ramos asserts, in order to preserve the issues of whether retroactive application of the definition of an "aggravated felony" was unconstitutional and whether he had in fact been convicted of an "aggravated felony." *See id.* Finally, plaintiff contends that, regardless of whether his immigration attorney was ineffective, the "automatic[] remov[al] from the United States without a right to challenge the[] removal on any ground[] is unconstitutional." *See id.* ¶ 5.2(c).[11]

In support of these claims, plaintiff attaches a "brief" to his complaint. The TRO application accompanying the complaint also has a supporting memorandum attached, which is virtually identical to the brief accompanying the complaint.

The government opposes plaintiff's habeas petition and TRO request solely on the ground that this Court lacks jurisdiction. *See* Opp'n at 1. This argument will be addressed first.

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[11] As relief, plaintiff seeks an order requiring the INS to drop its "hold" against plaintiff, "[q]uash[ing] the Immigration Court's removal order[] pending a hearing on the merits," and declaring "that th[e] portion of the Immigration laws . . . requiring automatic removal of lawfully admitted resident aliens upon a conviction of an 'aggravated felony' without an evidentiary hearing [is] unconstitutional." Complaint at 6.

A. Jurisdiction

The government relies on two relatively new provisions, 8 U.S.C. § 1252(b)(9) and (g), to assert that this Court lacks jurisdiction. These statutory provisions were added by section 306(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, -610, -612. The provisions are fully applicable here because the INS initiated proceedings against Arizaga Ramos on or after April 1, 1997. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997) ("IIRIRA's permanent provisions pertain to removal proceedings initiated by the INS on or after April 1, 1997").

The government first contends that jurisdiction in this Court is barred by 8 U.S.C. § 1252(g). *See* Opp'n at 2-6. This statute reads as follows:

> EXCLUSIVE JURISDICTION.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

IIRIRA, 110 Stat. 3009-612, codified at 8 U.S.C. § 1252(g). The Supreme Court recently interpreted this provision in *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936 (1999). In *Reno*, the Court ruled that section 1252(g) is concerned with, and precludes, collateral attacks on the Attorney General's exercise of prosecutorial discretion in deciding whether to initiate or continue immigration proceedings and

whether to execute removal orders that have been issued through such proceedings. *See id.* at 943-45. Applying this interpretation to the case before it, the Court held that the statute barred a district court lawsuit challenging the Attorney General's decision to initiate deportation proceedings—even though the challenge was based on a theory that the decision violated the First Amendment because the aliens were targeted for deportation based on their expression of political views. *See id.* at 945; *see also id.* at 939.[12]

The Court in *Reno* repeatedly noted its "narrow" interpretation of section 1252(g). *See id.* at 943, 945. The government therefore overstates the law's effect by asserting that the statute "broadly preclud[es] aliens from challenging the legality of their deportation or exclusion proceedings outside the context of the streamlined judicial review scheme established by Congress." Opp'n at 3:1-3. Instead, "[t]he provision applies only to three discrete actions that the Attorney General may take[,] [including] her 'decision or action' to '. . . execute removal orders.'" *Id.* at 943. "It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Id.* Here, plaintiff is contesting the validity of the removal order issued against him, rather than challenging any discretionary aspect of the Attorney General's imminent decision to execute the order.

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[12] Acknowledging that the plaintiffs could not raise their constitutional claims during immigration proceedings, the Court concluded that plaintiffs' constitutional claims were simply not cognizable. *See* 119 S. Ct. at 945-47.

Section 1252(g) therefore does not bar this Court's jurisdiction over the case.

The government also relies on section 1252(b)(9) to show that this Court lacks jurisdiction. *See* Opp'n at 6-8. That section reads as follows:

> CONSOLIDATION OF QUESTIONS FOR JUDICIAL REVIEW.—Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

IIRIRA, 110 Stat. 3009-610, codified at 8 U.S.C. § 1252(b)(9). In the *Reno* case, the Supreme Court suggested this statute would have a broad effect on the jurisdiction of the federal courts over future immigration cases. *See* 119 S. Ct. at 943 (describing statute as an "unmistakable 'zipper' clause," which happened not to apply to the pending case because of the date the INS initiated deportation proceedings). Under the statute (which fully applies to this case, given the date the government initiated removal proceedings), the only avenue of judicial review expressly provided for in section 1252 that might pertain to Arizaga Ramos's case is a petition to the Court of Appeals for direct review of the removal order issued against him. *See* 8 U.S.C. § 1252(a)(1), (b)(2). Therefore, as applied to the present case, section 1252(b)(9) divests this Court of jurisdiction.

Plaintiff advances two bases for jurisdiction, but neither is persuasive. First, plaintiff cites to 8 U.S.C.

§ 1105a(a)(8) & (10) as conferring habeas jurisdiction over immigration maters. *See* TRO Application at 3. Section 1105a was repealed by IIRIRA § 306(b). Accordingly, at pages 2-3 of his traverse, plaintiff withdraws his citation to section 1105a and instead cites to 8 U.S.C. § 1252(e)(2) & (3). However, these laws govern review of the summary removal procedures under section 235 of the INA. Because the government has sought to remove plaintiff under section 240, not section 235, these provisions are irrelevant here.[13]

Because the Court lacks jurisdiction, the request for preliminary injunctive relief is denied on this basis. However, even if the Court has jurisdiction, the request is also denied on the merits for the following additional reasons.[14]

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[13] For the same reason, the request set out at page 6 of plaintiff's traverse to have this case transferred to the District of Columbia is denied. The provision on which the request is apparently based, 8 U.S.C. § 1252(e)(3)(A), may require proceedings to be held in the District of Columbia, but the statute only pertains to challenges to removal under section 235.

[14] The Court recognizes that in *Reno* the Supreme Court left open the question whether habeas review of immigration proceedings remains available after IIRIRA. *See id.* at 942 n.7 (noting split in circuits). However, the Ninth Circuit decisions in point have been withdrawn or vacated, *see Magana-Pizano v. INS*, 119 S. Ct. 1137 (1999) (vacating lower court decision and remanding for reconsideration in light of *Reno*); *Hose v. INS*, 161 F.3d 1225 (9th Cir. 1998) (order withdrawing panel opinion and granting rehearing en banc), and the parties have provided no argument on the matter.

B. Merits

Plaintiff's complaint raises essentially three challenges to the removal order pending against him: First, that the "automatic deportation" of aliens with green cards "without an evidentiary hearing based on conviction of an aggravated felony" is unconstitutional, *see* Complaint ¶¶ 5.2(a), (c); second, that retroactive application of the definition of an "aggravated felony" is unconstitutional, *see id.* ¶ 5.2(b); and—third—that he has not been convicted of an "aggravated felony" requiring his removal from the United States, *see id.* None of these claims raises serious questions nor a likelihood of success on the merits.[15]

1. "Automatic Deportation"

Plaintiff alleges various constitutional violations based on his belief that, under IIRIRA, aliens with green cards are "automatically" subject to deportation

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[15] Plaintiff also contends he was denied effective assistance of counsel when his immigration attorney failed to file a timely notice of appeal to the BIA. *See* Complaint ¶ 5.2(b). However, to show ineffective assistance of counsel in immigration proceedings, an alien must show prejudice resulting from the alleged ineffectiveness. *See Mohsseni Behbahani v. INS*, 796 F.2d 249, 251 (9th Cir. 1986). The grounds on which Arizaga Ramos claims prejudice are set out in the text here. Because plaintiff fails to raise a serious question regarding the merits of any of these claims, he cannot show any prejudice and therefore he cannot succeed on a claim of ineffective assistance of counsel—even if the Court were to adjudge his immigration counsel's performance deficient. In any event, plaintiff offers no evidence regarding whether a competent immigration attorney would or would not have relied on the mail to deliver a notice of appeal in a timely manner under the circumstances in this case.

"without an evidentiary hearing based on conviction of an aggravated felony." *See* Complaint at ¶ 5.2(a), (c); *see also id.* at 9-11. This claim is meritless. Plaintiff appears to be referring to procedures under section 240 (which he erroneously refers to as section 240A) of the INA that were added by IIRIRA § 304(a)(3), 110 Stat. 3009-589 to -593, and which are codified at 8 U.S.C. § 1229a. These are the procedures under which the INS initiated removal proceedings against Arizaga Ramos. *See* Admin. Rec. at 34. Contrary to plaintiff's assertions, the procedures under this section contemplate an evidentiary hearing. *See* 8 U.S.C. § 1229a(b)(1) ("[t]he immigration judge shall . . . receive evidence"), (4)(B) (conferring rights on alien to present evidence and to cross-examine government witnesses). Indeed, in plaintiff's own case, a hearing was held and, it appears, evidence of his prior convictions was considered. *See* Admin. Rec. at 11-21.[16]

Apart from section 240, there are procedures under IIRIRA by which aliens just arriving in the United States may be removed without a hearing. *See* IIRIRA § 302(a) (amending section 235 of Immigration and Naturalization Act, as codified at 8 U.S.C. § 1225).

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[16] Plaintiff also contends that, at the time he was released on parole from the 1995 state conviction, "there was an INS hold for deportation under 8 U.S.C. § 240A(a) [sic], that requires automatic deportation for persons having an aggravated felony . . . without benefit of a hearing." *See* Complaint ¶ 4.11. Aside from his sworn statement, plaintiff offers no evidence of such a "hold." Furthermore, the existence of such a "hold" is unlikely since the INS did in fact initiate formal removal proceedings against plaintiff. *See* Admin. Rec. at 34. And even if such a "hold" existed, it likely does not affect the plaintiff because he was admitted to bail. *See id.* at 32.

However, plaintiff here neither refers to this specific portion of the statute, nor does he have standing to challenge it.

Instead of attacking immigration procedures, plaintiff actually appears to be complaining about Congress's decision that a single aggravated felony is sufficient to require the removal of an alien who is otherwise lawfully present in the United States. However, Congress has plenary authority over immigration matters. *See, e.g., United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1076 (9th Cir.) (noting that Congress's inherent power over immigration has been described as "plenary" and "sweeping"), *cert. denied*, 119 S. Ct. 433 (1998). Plaintiff's complaint therefore is a matter to be addressed to Congress, not the courts.

Plaintiff also argues that it violates equal protection to remove from the country aliens convicted of aggravated felonies, but not citizens so convicted. *See* Complaint at 8. This argument does not appear to relate to claims stated in the formal complaint; in any event, it is meritless. As the Second Circuit noted in rejecting virtually the same argument, "[d]eportation is not a remedy available against citizens but rather is an implementation of Congress' power to exclude." *Santelises v. INS*, 491 F.2d 1254, 1256 (2d Cir. 1974) (per curiam). Furthermore, any distinction drawn by the immigration laws has a rational basis in reducing the risk and effects on this country of recidivism. *Cf. id.* (deporting aliens convicted of misusing immigration documents had rational basis of maintaining integrity of immigration system). In addition, the Second Circuit's summary rejection of a claim that deportation is cruel and unusual punishment, *see id.* at 1255-56, addresses

Arizaga Ramos's allegation that removal "is in reality a form of impermissible constructive banishment." Complaint at 9; *see also* Traverse at 8 (referring to "cruel and unusual punishment").

Plaintiff also cites to several cases regarding detention of aliens pending removal or deportation. *See* Complaint at 8. However, these cases are not relevant here, as plaintiff was admitted to bail. *See* Admin. Rec. at 32. Plaintiff also relies on capital cases prohibiting mandatory imposition of the death penalty, apparently to support an argument that conviction of an aggravated felony alone cannot be a sufficient ground in itself to require deportation. *See* Complaint at 9; Traverse at 6-7. Death is different, however, and these cases have no bearing here. *See, e.g., Edelbacher v. Calderon*, 160 F.3d 582, 585 (9th Cir. 1998) ("The Supreme Court has repeatedly held that the death penalty is quantitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error.")

Finally, plaintiff claims that "the [Immigration] Court and the Board of Appeals refused Plaintiff an opportunity to argue the correct application of the law." Complaint at 10. Similarly, plaintiff asserts that "the need to remove has not been litigated." *Id.* at 11. The record shows, however, that a hearing was noticed for and apparently held on November 18, 1998. *See* Admin. Rec. at 11, 21. Furthermore, plaintiff had the option of appealing to the BIA, although he failed to do so in a timely manner. Thus, plaintiff had ample opportunity to present his arguments. In fact, he offers absolutely

no evidence that he was prevented from doing so, at least before the Immigration Judge.[17]

At bottom, plaintiff is aggrieved by the fact that his prior conviction for an "aggravated felony" prevented him from raising during the immigration proceedings any equities regarding his removal from the country. As stated above, this grievance must be addressed to Congress.

2. Retroactive Application of "Aggravated Felony" Definition

Arizaga Ramos claims (with virtually no supporting argument) that retroactive application of the definition of an "aggravated felony" to his case violates due process and the Ex Post Facto Clause. *See* Complaint ¶ 5.2(b)(1), (2). His claim, in essence, is that the conviction on which the INS has based its removal order was rendered in 1995, but Congress did not make

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[17] Plaintiff complains that the IJ "pretermitted" his application for cancellation of removal. *See* Complaint ¶ 4.13. However, this does not mean the IJ did not consider the application. Instead, the IJ acted within her authority when she summarily rejected the application because, as an alien convicted of an aggravated felony, Arizaga Ramos is not eligible for the discretionary relief of cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3); *cf. INS v. Bagamasbad*, 429 U.S. 24 (1976) (per curiam) (INS may pretermit issue of eligibility for discretionary relief by simply denying relief as a matter of discretion). While plaintiff claims that the IJ also pretermitted the constitutional issues he sought to raise, *see* Traverse at 4, the record shows only pretermission of the issue regarding cancellation of removal. *See* Admin. Rec. at 11. In any event, as discussed in this order, plaintiff's constitutional claims lack merit.

plaintiff's conviction an "aggravated felony" under the immigration laws until later.[18]

A similar claim was discussed in *Tam v. Reno*, No. C-98-2835 MHP, 1999 WL 163055 (N.D. Cal. Mar. 22, 1999) (Patel, C.J.). In *Tam*, the alien claimed a denial of due process based on the fact that IIRIRA had changed the effect of his prior conviction and thereby removed his eligibility for a discretionary waiver of deportation. The court described the issue presented in broad terms: "whether Congress intended [IIRIRA] to retroactively apply to criminal convictions that occurred before April 24, 1996, although the INS initiated removal proceedings after April 1, 1997." *Id.* at *8. Similarly, in the present case, Arizaga Ramos was found deportable in removal proceedings initiated after April 1, 1997, based on a 1995 conviction which Congress had only later deemed an "aggravated felony." Under such circumstances, the *Tam* court concluded that, while IIRIRA applied to convictions rendered before the statute was enacted, this was not an impermissible "retroactive" application of the law. *See id.* *7-*11.

After canvassing relevant authority, the *Tam* court followed a Ninth Circuit decision in reaching its conclusion. *See id.* at *10-*11. In the Ninth Circuit case,

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[18] Plaintiff does not show when Congress made his prior conviction an "aggravated felony" for purposes of the immigration laws. While the timing of these events matters for purposes of plaintiff's constitutional claim, it clearly does not matter for purposes of deciding whether a prior conviction meets the statutory definition of an "aggravated felony." Under IIRIRA § 321(b), codified at 8 U.S.C. § 1101(a)(43) (last paragraph), the term "applies regardless of whether the conviction was entered before, on, or after September 30, 1996."

the court held that an alien's 1986 convictions were effective under a 1988 statute to bar the alien's 1993 application for discretionary relief from deportation. *See Samaniego-Meraz v. INS*, 53 F.3d 254, 256-57 (9th Cir. 1995). In so holding, the court concluded that the 1988 federal statute did not have a "retroactive" effect. *See id.* at 256. Following this ruling, the *Tam* court concluded that IIRIRA could alter the consequences of a pre-existing conviction without violating due process. *See Tam*, 1999 WL 163055, at *11. The same rationale applies here to show that Arizaga Ramos's claims regarding alleged "retroactive" application of IIRIRA fails to raise a serious question.

3. Status of Plaintiff's Prior Conviction

Finally, plaintiff asserts (again, with little supporting argument) that he was not convicted of an "aggravated felony." *See* Complaint ¶ 5.2(b). To be removable under the statute cited in the Notice to Appear served on plaintiff, an alien must be convicted of an "aggravated felony." *See* 8 U.S.C. § 1227(a)(2(A)(iii) (codifying section 237(a)(2)(A)(iii) of the INA); *see also* Admin. Rec. at 34 (citing section 237 of the INA). The term "aggravated felony" includes "a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). In turn, section 924(c)(2) states that "the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.)," among other crimes. To apply these definitions, section 1101(a)(43) of title 8 notes, in its last paragraph, that "[t]he term ['aggravated felony'] applies to an offense described in this [subsection] whether in violation of Federal or State law . . . ." In analyzing whether a state conviction is an

"aggravated felony" under section 1101(a)(43), courts take a "categorical approach" by looking at the statutory definition of the crime and considering "whether the full range of conduct encompassed by [the statute] constitutes an aggravated felony." *United States v. Lomas*, 30 F.3d 1191, 1193 (9th Cir. 1994).

In the present case, the statutory definition for the crime of which Arizaga Ramos was convicted in 1995 states in pertinent part that "every person who possesses for sale any controlled substance . . . shall be punished by imprisonment in the state prison." Cal. Health & Safety Code § 11378. A state conviction under section 11378 necessarily means that the defendant possessed a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a). *Compare* CALJIC 12.01 (6th ed. 1996) (stating that elements of crime of possession for sale include knowing exercise of control over substance "with the specific intent to sell the same") *with United States v. Cain*, 130 F.3d 381, 382 (9th Cir. 1997) (summarizing elements of federal crime as "knowing possession . . . with intent to distribute"), *cert. denied*, 118 S. Ct. 1333 (1998). The quantity possessed is irrelevant for purposes of conviction under section 841(a). *See United States v. Brinton*, 139 F.3d 718, 723 (9th Cir. 1998).

Arizaga Ramos's conviction was for possession for sale of methamphetamine. *See* Admin. Rec. at 17. By possessing methamphetamine with intent to distribute, Arizaga Ramos violated section 841(a) and was at least subject to a maximum term of imprisonment of 20

years. *See* 21 U.S.C. § 841(b)(1)(C).[19] Plaintiff was thus convicted of a "felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.)" and, therefore, of an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43). Accordingly, the INS properly charged Arizaga Ramos with being removable based on a conviction for an "aggravated felony." *Cf. Haroutunian v. INS*, 87 F.3d 374, 375 & n.2 (9th Cir. 1996) (referring to conviction under 21 U.S.C. § 841(a) for possession of heroin with intent to distribute as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)).

IV. CONCLUSION

Because Arizaga Ramos has not raised serious questions regarding the merits of his case, the balance of hardships is not legally relevant. Accordingly, the request for interlocutory injunctive relief is hereby DENIED.

In order to expedite any appeal and related stay application, the Court now declines to exercise its authority under Federal Rule of Civil Procedure 62(c) to issue a stay pending appeal, and will not entertain a further motion for a stay pending appeal. The Court's reasons for doing so are the same as the reasons stated in support of the foregoing decision. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.) ("The standard for evaluating stays pending appeal is similar to that

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[19] As it was, Arizaga Ramos's California conviction subjected him to a possible term of imprisonment of two, three, or four years. *See* Cal. Health & Safety Code § 11351; *see also Lomas*, 30 F.3d at 1194. It appears he received a two-year term. *See* Admin. Rec. at 15.

employed by district courts in deciding whether to grant a preliminary injunction."), *stay granted*, 463 U.S. 1328 (1983). Any application for a stay pending appeal should be directed to the appellate court. *See* Fed. R. App. P. 8(a)(2).

IT IS SO ORDERED.

DATED: May 25, 1999

\s\ SAUNDRA B. ARMSTRONG
SAUNDRA BROWN ARMSTRONG
United States District Judge

APPENDIX B

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A35 581 469 - San Francisco Date: MAR 12 1999

In re: ARTURO ARIZAGA-RAMOS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael P.
Karr, Esquire

ORDER:

PER CURIAM. The appeal is untimely. A Notice of Appeal (Form EOIR-26) must be filed within 30 calendar days of an Immigration Judge's oral decision or the mailing of a written decision. In the instant case, the Immigration Judge's decision was rendered orally on November 18, 1998. The appeal was accordingly due on or before December 18, 1998. The record reflects, however, that the Notice of Appeal was filed with the Board of Immigration Appeals on December 21, 1998. We find that the appeal is untimely. The Immigration

Judge's decision is accordingly now final, and the record is returned to the Immigration Court without further action. See 8 C.F.R. §§ 3.3(a), 3.38, 236.7, and 242.21 (1997).

SIGNATURE ILLEGIBLE
FOR THE BOARD

APPENDIX C

(seal omitted) **U.S. Department of Justice**

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

LARRY SHANAHAN
615 WOODSIDE ROAD
REDWOOD CITY, CA 94061

FILE: A35 581 469 — Office: San Francisco
Date: SEP 30 1999

IN RE: Obligor: LARRY SHANAHAN
Bonded Alien: ARTURO ARIZAGA-RAMOS

IMMIGRATION BOND: Bond Conditioned for the Delivery of an Alien under § 103 of the Immigration and Nationality Act, 8 U.S.C. 1103

IN BEHALF OF OBLIGOR:

JAMES JOSEPH LYNCH, JR.
2740 HOWE AVENUE
SACRAMENTO, CA 95812-0336

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires my be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

\s\ SIGNATURE ILLEGIBLE
for Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The delivery bond in this matter was declared breached by the Acting District Director, San Francisco, California, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record indicates that on June 20, 1997, the obligor posted a $20,000 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated May 6, 1999, was sent to the obligor via certified mail, return receipt requested. The notice demanded the bonded alien's surrender to the Immigration and Naturalization Service (the Service) for removal at 9:30 a.m. on June 1, 1999, at 630 Sansome Street, Room 113, San Francisco, CA 94111. The obligor failed to present the alien, and the alien failed to appear as required. On June 16, 1999, the acting district director informed the obligor that the delivery bond had been breached.

On appeal, counsel asserts that the obligor reasonably believed that the alien's removal had been cancelled based on an appeal filed with the Ninth Circuit Court.

8 C.F.R. 241.6 provides in pertinent part that neither the request for a stay of deportation or removal or the failure to receive notice of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for deportation or removal.

Delivery bonds are violated if the obligor fails to cause the bonded alien to be produced or to produce himself/herself to an immigration officer or immigration judge, as specified in the appearance notice, upon each and

every written request until removal proceedings are finally terminated, or until the said alien is actually accepted by the Service for detention or removal. *Matter of Smith*, 16 I&N Dec. 146 (Reg. Comm. 1977).

The regulations provide that an obligor shall be released from liability where there has been "substantial performance" of all conditions imposed by the terms of the bond. 8 C.F.R. 103.6(c)(3). A bond is breached when there has been a substantial violation of the stipulated conditions of the bond. 8 C.F.R. 103.6(e).

8 C.F.R. 103.5a(a)(2) provides that personal service may be effected by any of the following:

> (i) Delivery of a copy personally;
>
> (ii) Delivery of a copy at a person's dwelling house or usual place of abode by leaving it with some person of suitable age and discretion;
>
> (iii) Delivery of a copy at the office of an attorney or other person including a corporation, by leaving it with a person in charge;
>
> (iv) *Mailing a copy by certified or registered mail, return receipt requested, addressed to a person at his last known address.*

(Emphasis supplied.) The bond (Form I-352) provides in pertinent part that the obligor "agrees that any notice to him/her in connection with this bond may be accomplished by mail directed to him/her at the above address." In this case, the Form I-352 listed 615 Woodside Road, Redwood City, CA 94061 as the obligor's address.

Contained in the record is a certified mail receipt which indicates that the Notice to Deliver Alien was sent to the obligor at 615 Woodside Road, Redwood City, CA 94061 on May 6, 1999. This notice demanded that the obligor produce the bonded alien for removal on June 1, 1999. The receipt also indicates the obligor received notice to produce the bonded alien on May 18, 1999. Consequently, the record clearly establishes that the acting district director properly served notice on the obligor in compliance with 8 C.F.R. 103.5a(a)(2)(iv).

Furthermore, it is clear from the language used in the bond agreement that the obligor shall cause the alien to be produced or the alien shall produce himself to a Service officer upon each and every request of such officer until removal proceedings are either finally terminated or the alien is accepted by the Service for detention or removal.

It must be noted that delivery bonds are exacted to insure that aliens will be produced when and where required by the Service for hearings or removal. Such bonds are necessary in order for the Service to function in an orderly manner. The courts have long considered the confusion which would result if aliens could be surrendered at any time or place it suited their or the surety's convenience. *Matter of L-*, 3 I&N Dec. 862 (C.O. 1950).

After a careful review of the record, it is concluded that the conditions of the bond have been substantially violated, and the collateral has been forfeited. The decision of the acting district director will not be disturbed.

ORDER: The appeal is dismissed.

09/10/99/AAORDB01/N/35581469.bnd
(initials illegible)